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NO. _____

IN THE

SUPREME COURT
OF THE UNITED STATES

October Term 1993

JIMMY G. MOORE,

Petitioner,

v.

ELI LILLY & CO.,

Respondents.

Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

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QUESTIONS PRESENTED

I. Whether a discrimination claimant can defeat an employer's Motion for Summary Judgment by: (1) Establishing a prima facie case (under **McDonnell-Douglas v. Green**); and (2) providing evidence, sufficient to raise a fact issue, that the reason advanced by the employer for its actions is "unworthy of credence."

II. Whether a supervisor's prior questions about an age claimant's intention to retire, and suggestions that he would retire if he were in the claimant's shoes, constitute any evidence of an age-related motive for termination?

QUESTIONS PRESENTED - (Continued)

III. In reviewing the evidence in connection with a Motion for Summary Judgment, should a Trial Court presume a lawful intent as to such statements about retirement, or should the inference be of unlawful intent and against the party seeking summary judgment?

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Jimmy G. Moore

Eli Lilly & Co.

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OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 990 F.2d 812 (5th Cir. 1993) and is reproduced in the Appendix at page A-1. The Opinion of the District Court is reported at 802 F.Supp. 1468 (N.D. Tex. 1992) and is reproduced in the Appendix at Page A-30.

JURISDICTION

The Judgment of the Court of Appeals was entered on April 30, 1993. Petitioner filed a timely Motion for Rehearing which was denied by Order dated May 25, 1993, reproduced in the Appendix at Page A-52. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The statute involved in this case is the Age Discrimination in Employment Act (ADEA) 29 U.S.C. §623 which provides in pertinent part:

> "It shall be unlawful for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;"

and 29 U.S.C. § 631 which provides:

> "The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age."

STATEMENT OF THE CASE

This is a summary judgment case which presents the Court with the opportunity to clarify the application of **St. Mary's v. Hicks**, 1993 WL 220265 (June 25, 1993) to the summary judgment stage of a discrimination case. The need for clarification of **St. Mary's** at the summary judgment phase is demonstrated by statements made in both the Majority Opinion and in the Dissent.

The Majority Opinion in **St. Mary's** stated that after the establishment of a prima facie case by the plaintiff and articulation by the employer of its reasons, that:

> "The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." (p. 5, Opinion)

This language obviously would indicate that evidence constituting a prima facie case, plus evidence sufficient to raise factual issues that the employer's reasons are "unworthy of credence", will defeat a motion for summary judgment and permit the case to be tried. Other portions of the Majority Opinion, however, can be interpreted to downplay the value of the prima facie case as providing sufficient proof of intentional discrimination in this situation. These portions caused the Dissent to observe that the Majority Opinion, "...gives conflicting signals about the scope of its holding in this case." (p. 16) The Dissent points out that the Majority's language, quoted above and the remand in **St. Mary's** would require denial of an employer's motion for summary judgment under such evidence, but the Dissent goes on to question

whether this is what the Majority intended, stating:

> "But other language in the Court's opinion supports a more extreme conclusion, that proof of the falsity of the employer's articulated reasons will not even be sufficient to sustain judgment for the plaintiff. For example, the Court twice states that the plaintiff must show 'both that the reason was false, and that discrimination was the real reason.' Ante, at 13; see ante, at 5. In addition, in summing up its reading of our earlier cases, the Court states that '[i]t is not enough ...to disbelieve the employer.' Ante, at 17 (emphasis omitted). The 'Pretext-plus' approach would turn Burdine on its head, see, n. 7, supra, and it would result in summary judgment for the employer in the many cases where the plaintiff has no evidence beyond that required to prove a prima facie case and to show that the employer's articulated reasons are unworthy of credence." (Emphasis Added) (p. 16)

The instant case presents the Court with the ideal opportunity to eliminate any and all confusion about the standard of proof required of a claimant to withstand summary judgment in this situation. A summary judgment was granted to the

employer here (Lilly), even though a prima facie case was established by Petitioner, Moore, as both lower Courts found. Moore also presented evidence from Lilly's own records and witnesses that showed that the reason it advanced for Moore's termination in its Motion for Summary Judgment was "unworthy of credence." However, both lower Courts applied the "pretext-plus" standard to Moore's evidence and ruled that his showing that such reasons were false was not sufficient, because the evidence of pretext did not, in and of itself, show age as Lilly's motive. Both Courts ignored the inference of age discrimination created by the prima facie case as well as other direct evidence of age bias. This direct evidence consisted of statements made by Moore's supervisor, but the Courts inferred that such statements showed only lawful motives - rather than

inferring an unlawful motive, as required by this Court for evaluating evidence at the summary judgment stage.

While it is believed that granting this Petition for Writ will allow the Court to clarify matters in this important area, the uncertainty can also be dissipated in a less formal manner by the Court remanding this case to the Trial Court with instructions to reevaluate Moore's evidence of pretext under the "unworthy of credence standard" as expressed in **Texas Dept. of Community Affairs v. Burdine**, 450 U.S. 248, 101 S.Ct. 1089 (1981) and now in **St. Mary's**. It is also urged that such a remand should point out that inferences drawn from ambiguous statements should be adverse to the party seeking summary judgment, under the decisions of this Court. The Fifth Circuit's Opinion does great injustice to Moore, and, if allowed

to stand uncorrected, will also further the confusion which the Dissent believes now exists from the Opinion in **St. Mary's**. It is vitally important that the lower Courts, the Equal Employment Opportunity Commission, various civil rights organizations, and practitioners in this field understand and apply the correct legal standards to evidence of pretext at the summary judgment stage of any type of discrimination case where a prima facie case has been presented.

Since the Courts below concluded that Moore's evidence of pretext was not sufficient, they did not set forth many of the relevant facts in their Opinions. It is therefore necessary to set forth the important evidence that was before the Court on the Motion for Summary Judgment. For the convenience of the Court, the evidence is grouped into two categories, those facts that are undisputed and

those facts where there is some degree of controversy.

I. Undisputed Summary Judgment Facts.

Prior to his discharge, Moore had been employed by Lilly for 30 years as a sales representative. At the time of his termination he was age 59. (R. 141, Vol. 3-Moore)[1] Prior to January 1, 1990, Moore had been supervised for 14 years by Emory Walker, who was the Dallas District Manager. Walker retired in December 1989. (R. 134, Vol. 3-Walker) and Charles Yelverton, who had been the Regional Personnel Manager of the Dallas Region, became the District Manager at that time.

Both Walker and Yelverton testified that Moore was a satisfactory sales representative. (R. 52, Vol. 3-Yelverton; R.

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[1] The Record is misnumbered with both Volumes 1 and 3 being numbered beginning with "001." References thus are to Volume and page number, with the name of the witness added for the convenience of the Court.

135, Vol. 3-Walker) Lilly says that Moore was terminated for one single event of alleged wrongdoing, "falsification of records." (R. 36, Vol. 3-Yelverton) After his termination, Moore was replaced by John Lorenz, age 35 (date of birth July 26, 1956). (R. 45, Vol. 3 - Yelverton) Yelverton was 34 years old at the time. (R. 44, Vol. 3-Yelverton)

Lilly's sales representatives make calls on doctors and leave them samples of various drug products, which the company hopes the doctors will then prescribe for use by patients. When a sample is left with a doctor, the sales representative must fill out a doctor's "call card" showing the name of the doctor and the type and number of samples that were left. The doctor signs the call card acknowledging receipt of the samples. These cards are then mailed to the Sample Accountability Department at

Lilly's Home Office on a daily basis. (R. 185, Vol. 1-Hap) This allows the company to keep track of the distribution of its samples and prevents a salesman from selling the samples to someone for a personal profit.

Apparently, a black market in drug samples had existed at one time which caused Congress to pass the Prescription Drug Marketing Act in 1988 (PDMA). (R. 177-181, Vol. 1-Kohlik) This statute requires drug companies, such as Lilly, to keep track of samples and to report certain violations, including a "significant" shortage of samples. Lilly ships samples to salesmen at their homes and they sign for samples when they are received. (R. 118, Vol. 1-Moore) The Sample Accountability Department keeps track of the shipments and keeps a running total of disbursements through the daily call cards. Then, on a quarterly

basis, each salesman takes inventory of what he has on hand and sends this information to Sample Accountability. (R. 71-85, Vol. 1-Moore) This department checks the information against its own records and advises the salesman whether he is in or out of balance. If a salesman is out of balance and the salesman and Sample Accountability cannot find the reason for the discrepancy and reconcile matters within the allowed tolerance, the salesman is placed on a daily accountability program - which requires him to reconcile daily instead of only at the end of the quarter. (R. 186, Vol. 1 - Hap) (R. 49, Vol. 3-Yelverton) This is the only action taken by Lilly when the salesman cannot reconcile - contrary to the statements of the Trial Court and the Court of Appeals that such can be a basis for "termination!" (See, Fifth Circuit Opinion, p. 814) Coyne stated that if

Moore had made no attempt to reconcile "nothing would have happened." (R. 71, Vol. 3-Coyne) There is no evidence that anyone had been terminated simply for their inability to reconcile or for errors made while trying to do so.

Moore was advised in September of 1990 that his accounting for the second quarter (ending in June 1990) did not balance and he was given a report showing the discrepancies by Sample Accountability. (R. 144, Vol. 3-Moore) The same report gave him a specific time to call Sample Accountability and attempt to reconcile. He called at the appointed time and discussed with Kathy Hagerman of Sample Accountability what could be causing him to be out of balance. (R. 101, Vol. 3-Moore) There were several areas of discrepancy discussed - all of which were resolved except one. He was still short on Axid 300 by 98 samples, but he was

over on Axid 150 by 141 samples.[2] According to Moore, Ms. Hagerman suggested to him that he must have marked that he was sampling Axid 150, when he had actually been handing out Axid 300. (R. 101, 105, Vol. 3-Moore) (These two entries are on adjoining lines on the call card and, obviously, it was an error he could have made and this would have explained the overage on Axid 150 and shortage on Axid 300 and put him in balance, within a tolerance allowed by Lilly).

Moore agreed with Hagerman that this improper marking must be the proper explanation. Hagerman then asked Moore to write a letter stating that he had mismarked the specified number of call

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[2] Axid is a drug that slows down the production of acid in the stomach and is prescribed for ulcer patients and patients with cronic indigestion.

cards, and Moore did so. (R. 164, Vol. 1-Moore) (Instead of writing a letter, Moore could have filled out a printed form which Lilly supplied to sales representatives for correcting mismarked call cards.) (R. 145, Vol. 3) (See Appendix page B) The problem then appeared to be resolved and Moore was written a letter by Hagerman so stating. (R. 164, Vol. 3-Moore) (See Appendix C)

Later, however, Lilly's shipping department contacted Hagerman and advised her <u>they</u> had made an error in posting. A shipment of 100 Axid 300 had been recorded as having been shipped to Moore, when in fact it <u>had not</u> been shipped at all, but had been back-ordered for subsequent shipment. Had this correct information been entered, there would have been <u>no shortage</u> shown in the first place

and there would have been no need for Moore to even attempt to reconcile![3]

Subsequently, Moore was told by Hagerman of the error made by the shipping department. Moore then asked Hagerman to send back the letter stating that he had mismarked cards, since it was now apparent that he had not mismarked any cards. Hagerman told him that she could not do so.

In this same discussion, Moore was told by Hagerman that he would be placed on the "daily log" accounting procedure and a letter to that effect was written him by Sample Accountability, and the materials actually sent to him for doing so. (R. 147, Vol. 3-Moore) (See Appendix C) Yelverton, who had apparently been on

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[3] He still would have distributed 141 more samples of Axid 150 than he was supposed to ever have according to the home office records, but this never seemed to bother Lilly, because shortages were the concern of the statute.

vacation, subsequently called Moore and made some comment that Moore was accused of "falsifying records." Moore responded that it was all being taken care of - thinking it was, by him being placed on the "daily log." (R. 112, Vol. 3-Moore)

II. **Facts As To Which There Is Some Degree Of Dispute**.

Shortly thereafter, on October 12, 1990, after a sales meeting, Moore was called into an office by Yelverton and Reynolds, the Regional Personnel Representative, and told by Yelverton that, as of that moment, he was terminated. According to Moore's deposition:

> "A. ..."I went over and sat down, and he says, and quote, 'It is 3:05 October the 12th, 1990. As of this minute, you are no longer with Eli Lilly and Company.'"
>
> * * * *
>
> "A. I said, 'what?' I was shocked and he says -- he repeated what he had just got through saying. 'It's 3:05 October the 12th, 1990. As of this moment, you are no longer with Eli Lilly and Company.'

And my next comment to him was 'I don't understand. What is the problem?'

He says, 'You have falsified records, and that's a dismissal offense according to the Sales Manual, and you have been terminated.'

* * * *

And I started thinking about the loss of - and other things that might happen; and so, I says, 'Is there any recourse? Do I have any options? Do I have any other choices?'

And he says, 'Well, it won't make any difference one way or the other. It's all the same thing, but you can put a letter of resignation in the file,' and he handed me a piece of paper and a pen and I wrote 'As of now, I'm no longer with -- or I resign from Eli Lilly and Company and handed it back to him.

And I started to leave and he said, 'Don't you have any explanation?'

I said, 'Charlie, (Yelverton) you fired me. What difference does it make?'" (R. 113-114, Vol. 3 - Moore)

Yelverton admitted the sequence went basically as described by Moore. (R. 46, Vol. 3-Yelverton) However, Lilly now

claims that Moore was not terminated at this point - only suspended.

Moore immediately received a letter from Lilly, dated October 16, 1990, confirming that he was indeed terminated on October 12th. (R. 94, Vol. 3-Coyne) (See Appendix D) Yelverton also wrote a memo to file that absolutely confirmed that he had terminated him. (R. 63, Vol. 3 - Yelverton) Lilly later told the EEOC that Moore had been terminated by Yelverton in the October 12th meeting! (R. 92, Vol. 3) (See Appendix E, page 7)

Immediately after his termination, Moore wrote a letter to the Chairman of the Board of Lilly and other high officials protesting his termination. (R. 124, Vol. 3 - Moore) Approximately ten days later, two Home Office officials, Mr. Wocheck and Mr. Coyne came to Dallas

to meet with Moore.[4] At this meeting, Moore gave them an explanation of what had taken place and told them that he was simply trying to straighten out the records in writing the letter and asking for it back. (R. 80. Vol. 3-Coyne) Wocheck and Coyne subsequently decided to change the termination date (R. 83-84, Vol. 3-Coyne) and a new letter was written to Moore dated November 16th showing his termination to be effective December 31, 1990. (R. 95, Vol. 3 - Coyne)

In its Motion for Summary Judgment and Brief, Lilly contended that Moore was terminated by Coyne and Wocheck when they met with him and that he had not been terminated by Yelverton on October 12th. Lilly said that Coyne instructed

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[4] Coyne is Director of Personnel of the Lilly Sales Division. (R. 188, Vol. 1 - Coyne). Wocheck was Vice-President of Lilly Sales Division. (R. 65, Vol. 3 - Coyne)

Yelverton on October 12th to simply suspend Moore by "taking him out of the field" which is all that Yelverton did. Lilly further said that Moore "falsified records" which has uniformly been a dischargeable offense at Lilly. The "falsification" occurred, according to Lilly, when Moore wrote his letter to Sample Accountability stating that he had mismarked the cards when he had not mismarked them. Lilly says that when he asked for the letter back, he compounded the violation.

REASONS FOR GRANTING THE WRIT

I. The Court's Below Applied The "Pretext-Plus" Standard And Not That Established By Burdine and St. Mary's.

Lilly's own documentary evidence and the testimony of Moore and Yelverton make clear that, in fact, Yelverton terminated Moore on October 12th and did not simply

suspend him! The Trial Court acknowledged that an issue of fact was created as to how Moore was terminated, but felt that this had no relevancy because it did not, itself, show Moore's age to be the motive. The Trial Court said that the Fifth Circuit had outlined a new "pretext burden" beyond that required by **Burdine** by the decisions in **Hanchey v. Energas Co.**, 925 F.2d 96 (5 CA 1990) and **Bienkowski v. American Airlines, Inc.**, 851 F.2d 1503 (5th Cir. 1988). (A-43) Utilizing this standard, the Trial Court found that Moore's evidence of pretext fell short because it did not, itself, show age discrimination as the reason. The Fifth Circuit agreed with the Trial Court and quoted from and adopted that part of the Trial Court's Opinion. (A-27)

It is clear that the Trial Court and the Court of Appeals measured Moore's

evidence of pretext under the "pretext-plus" standard - meaning that proving Lilly's reason to be false is not sufficient, in spite of Moore's prima facie case. The Fifth Circuit's Opinion did not acknowledge that it had established a "new pretext burden" in **Hanchey** and **Bienkowski**, rather it said that the standard set forth therein had always been the test - i.e. it saw no difference between **Burdine**, **Hanchey** and **Bienkowski**. **St. Mary's** has now made clear that there is a difference, which at least the Trial Court saw when it labeled the **Hanchey** and **Bienkowski** test as a "new pretext burden" - i.e. "pretext plus."

The Fifth Circuit evidenced total confusion about: (1) the importance of a prima facie case and (2) what is required to show pretext. This is well demonstrated by the fact that it cited, with approval, the reasoning of the Eight

Circuit in **St. Mary's** to the effect that establishing the employer's reason to be "unworthy of credence" automatically entitled the claimant to judgment. Yet, it ignored the fact that Moore had established a prima facie case and that his evidence raised fact issues about Lilly's story being "unworthy of credence." It said that proving "unworthy of credence" was not enough to show "pretext" and that the pretext evidence must itself evidence age discrimination.[5] Thus, in evaluating

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[5] A comment by the Court in Hanchey offered a preview of what would later happen to Moore. The Court there attempted to explain the two Burdine tests, saying:

> "Such pretexts can be proved either by showing that a discriminatory reason motivated the defendant or by showing that the proferred reason is unworthy of credence. The latter method, however, must extend beyond casting doubt on the reasonableness of the employer's action; otherwise, the law would be converted to a 'just cause' provision for the

Footnote continued on next page.

Moore's evidence the Court said (using "pretext-plus"):

> "Moore argues that six facts surrounding his termination (noting that 'the list could easily be continued') demonstrate Lilly's discriminatory intent. (Emphasis added) These facts, which for purposes of this review we assume to be true are:
>
> * * * *

Footnote continued from previous page.

> protected class of employees, an effect that Congress clearly did not intend." (Emphasis Added) (p. 98)

Judge Weiner, the author of the Opinion in Moore, was a member of the panel in Hanchey and applied his pretext-plus requirement to Moore. This statement is an unwarranted extension of the Burdine test and cannot be reconciled with either Opinion in St. Mary's.

"Reasonableness" is an inherent part of the main issue of the employer's overall credibility. Employers clearly have the right to act unreasonably without violating the law and the jury should be so instructed, but the jury should be allowed to evaluate this as a part of determining "unworthy of credence" - without the total foreclosure of this which results from applying "pretext-plus" at the summary judgment stage.

(listing 6 reasons)

> Concerning these six assertions, the District Court stated: 'While these conflicting accounts indicate a factual dispute as to exactly how Moore was terminated, their existence does not provide direct (or even indirect) proof that he was fired because of age.' We agree." (Emphasis by the Court)
> (p. 819) (Appendix P. A-14 and A-15)

Contrary to what the Fifth Circuit said he argued, Moore did not "argue" that these six facts showed "Lilly's discriminatory intent"! Moore said that these six facts showed that Lilly's story was false! Moore agrees that this evidence does not, in and of itself, show "Lilly's discriminatory intent," but that is not necessary! **Burdine**, and now **St. Mary's**, say that after presenting a prima facie case, the plaintiff can prevail by showing that the defendant's reasons are "unworthy of credence." This was precisely the reason Moore offered this evidence! The proof of age as the motive

came from the inference created by the prima facie case and Moore's other evidence, not from the pretext evidence itself!

Had the Fifth Circuit asked if the six items listed "demonstrate Lilly's reasons to be 'unworthy of credence'", the answer obviously would have been "Yes" because Lilly's reasons, advanced to the Trial Court in its summary judgment motion, differed substantially from the story that Lilly told the EEOC during its investigation; differed from Lilly's own written documentation; and was not supported by the testimony of its own witnesses! A review of the evidence on three critical issues (out of the six listed) demonstrates this:

1. **Who Terminated Moore, Yelverton or Coyne?**

Lilly says in its Motion for Summary Judgment that Yelverton did not terminate Moore in their meeting on October 12th, and that he was terminated by Coyne several weeks later. In stark contrast, the evidence shows:

(1) Yelverton said in his memo and in his deposition that he terminated Moore on October 12th.

(2) Lilly's letter to Moore of October 16th told him he had been terminated. (At that time he had not yet met with Coyne!)

(3) Moore understood that Yelverton was terminating him on October 12th and, thus, Moore wrote a letter of resignation to Yelverton and, subsequently, wrote a letter of protest to Lilly's Chairman of the Board.

(4) Lilly told the EEOC that Yelverton had terminated Moore on October 12th.

2. Did Moore "Falsify Records" Under Lilly's Rules?"

(1) Coyne says that an "intent to deceive" the company is necessary to constitute this offense. This is also what Lilly told the EEOC. Coyne did not think that Moore was trying to deceive and hide any wrongdoing. He testified:

> "Q. In other words, is knowingly intent or knowledge to do something wrong to cover something, is that a part of the element of falsifying records?
>
> A. In my opinion, yes.
>
> Q. So that if an unintentional mistake is made, it would not be regarded as falsifying records.
>
> A. Correct." (R. 70, Vol. 3 - Coyne)

* * * * *

> "Q. Did you ever conclude that Mr. Moore had been guilty of anything such as improper distribution of prescription drugs?
>
> A. No." (R. 85, Vol. 3 - Coyne)

(Perhaps this is why he instructed Yelverton to only suspend him.)

(2) Contrary to Coyne and Lilly's letter to the EEOC, Yelverton says that any mismarking of a card constitutes this offense, so that "intent to deceive" is not necessary. (R.47, Vol. 3, Yelverton) Yet, Lilly furnished salesmen a printed form to correct mismarking of call cards. (See Appendix B) It is highly unlikely that a company would devise a printed from to encourage "falsification of records." Yelverton found himself forced to contend that any mismarking constituted this offense to attempt to justify the action he had taken.

3. **What Explanation Exists In The Record For Yelverton's Actions, Other than Age Discrimination?**

(1) Coyne testified that he instructed Yelverton not to terminate Moore, but to "take him out of the field"

- suspend him - pending a final review and decision. It is obvious that Yelverton acted against direct orders and made the decision to terminate Moore instantly. Why? Moore was a satisfactory salesman by the admission of all concerned!

(2) Prior to Yelverton's action, the Sample Accountability Department had already decided that the appropriate action was to place Moore on a "daily log" and had communicated this fact to Moore. (See Appendix C) This action alone was satisfactory to that department. The inability to reconcile was not a termination offense, so Yelverton turned it into "falsification of records." There is simply no other explanation "lurking in the record" to explain why he would to this - except age bias.

The sharp disagreement between the Majority and the Dissenting Opinion in **St. Mary's** was over whether or not the fact finder's disbelief of the employer's reasons automatically entitled the claimant to judgment. Moore does not take sides on that issue because both opinions in **St. Mary's** make clear that disproving the employer's case may lead to a favorable judgment for the claimant at trial. If so, then summary judgment is not proper. Here, however, inconsistencies in every element of Lilly's story were not sufficient to even allow Moore the opportunity to go to trial - because the Fifth Circuit required Moore's evidence attacking Lilly's credibility to include

proof of "Lilly's discriminatory intent" - the "pretext-plus" test![6]

The "pretext-plus" requirement had logical beginnings in the Fifth Circuit, but it has since been improperly applied. It was created in **Williams v. General Motors**, 650 F.2d 120 (5th Cir. 1981) cert. den. 455 U.S. 943 (1982) to deal with those age discrimination cases where the claimant was not replaced by an employee under age 40, but was simply laid off as a part of a work force reduction. In such instances, no prima facie case had been established by the claimant and, thus, no inference of discrimination was created under **McDonnell-Douglas v.**

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[6] The entire thrust of the Majority Opinion in **St. Mary's** was to allow the fact finder discretion to find or reject discrimination as the employer's basis for action, and not restrict this discretion by an automatic action by the Court. However, when the "pretext-plus" standard is used, the result will inevitably be automatic exclusion of the fact finder from ever having the opportunity to hear the case.

Green.[7] Likewise, in such layoff cases, there was no other evidence that age was a motivating factor. Thus, when claimants attempted to disprove the validity of the employer's reasons for the layoff, the Fifth Circuit held that, while the employer's reasons might be wrong, this did not prove that the employer acted because of age discrimination. The Hanchey case, relied on by the Trial Court and by the Fifth Circuit, was precisely such a layoff case in which no prima facie case had been presented and there was no other basis for inferring age discrimination.

The Bienkowski case, also relied on heavily by the Trial Court and the Fifth Circuit, involved the replacement of the claimant by someone who was also in the

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[7] This history of the test is well summarized in Thornbrough v. Columbus and Greenville R. Co., 760 F.2d 633 (5th Cir. 1985) at p. 642.

protected age category and who was only a few years younger than the claimant. In this situation the Court expressed doubt that a prima facie case had been presented and proceeded to evaluate the evidence as though the case were a layoff case, without any inference of age bias being created by a prima facie case.

Moore has no dispute with **Bienkowski** or the layoff cases and the standard of proof that they require - that the evidence of pretext must also show evidence of age discrimination (pretext-plus) - if they are limited to where there is no prima facie case or other evidence of age bias. In such situation, the evidence of pretext must, itself, contain the evidence of discrimination, because the pretext evidence is all the evidence in the case. The error occurred here because the original logic of these cases has somehow been lost and the inference

created by a prima facie case is being totally ignored. "Pretext-plus" is simply being applied, incorrectly, where it was never intended to be applied.

II. The Lower Courts Improperly Drew Inferences In Favor Of The Motion For Summary Judgment.

By presuming that the age-related statements made by Yelverton had only lawful purposes, the lower Courts did not follow the clear standard required by this Court for evaluating such statements in connection with a motion for summary judgment as set forth in **U.S. v. Diebold, Inc.**, 369 U.S. 654 82 SC 993 (1962); **Adickes v. S. H. Kress & Co.**, 398 U.S. 144, 90 S.Ct. 1598 (1970); and **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 106 S.Ct. 2505 (1986). Prior to terminating Moore, Yelverton made various remarks that made reference to Moore's age.

Three (3) events illustrate the error of the lower Courts:

(1) Yelverton asked Walker just before he retired if he knew when Moore was going to retire and indicated he had a replacement in mind who was a young student. Walker testified:

> "Q. Did he ever ask you if you knew when Mr. Moore was going to retire?
>
> A. Yes.
>
> Q. How did that conversation come up?
>
> A. He simply said, do you know if Moore is going to retire any time soon, or something to that effect, you know.
>
> Q. And what was your response?
>
> A. I told him that I didn't know, that Jim had indicated to me that he was going to retire as soon as his son got out of medical school and -- but that was not an official announcement that he was going to retire then.
>
> Q. Did he ever say why he was interested in whether or not Mr. Moore was going to retire versus somebody else?

> A. Only to the extent that I answered a moment ago, that he felt like he had a candidate for that vacancy if Mr. Moore had retired. And he felt that Mr. Zager would fit that qualification." (R. 137-138, Vol. 3 - Walker) (Zager was a young student)

(2) Later, Yelverton asked Moore this same question. (R. 121-122, Vol. 3 - Moore).

(3) After Yelverton became Moore's manager, he rode with him in making his calls and Moore described an incident where he and Yelverton were passing a camper and recreation vehicle sales lot and Yelverton gave Moore a "lecture" that if he was in Moore's position he would quit, buy a camper and "explore the world." (R. 121, Vol. 3-Moore) He asked Moore why he didn't do that?

The Trial Court held that these were "stray" remarks intended by Yelverton to determine his future manpower needs, in the event an opening should be created

because of Moore's retirement. The Trial Court cited as authority certain cases in which age-related remarks were held to be "stray" and harmless because they were made by individuals who were not involved in the decision making process.[8] The Fifth Circuit made no reference to Yelverton's remarks as "stray" remarks, but did presume that Yelverton's question to Moore and to his prior supervisor, Walker, were only for legitimate manpower planning purposes.[9] It also presumed that the remark to Moore about what Yelverton would do if he were in Moore's position was simply wishful thinking by Yelverton.

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8 Obviously, the Trial Court must have concluded, as a matter of law, that Coyne, not Yelverton, terminated Moore - otherwise, the citation of the "stray remark" cases is senseless.

9 This explanation was even originated by the Trial Court - not Yelverton.

It is possible that these remarks were made with this intent, but they could also show that Yelverton harbored an illegal intent! The inquiry about Moore's future plans could indicate Yelverton's hope that he would get to replace Moore with young Mr. Zager. Yelverton's comment to Moore about what he would do if he were in Moore's shoes can likewise be interpreted as a suggestion to Moore about what Yelverton wanted to happen and what Moore should do![10] Where two different inferences, one lawful and one unlawful, can be drawn from such statements, this Court has made very clear that the inference should be adverse to the party seeking a summary

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10 This Court has noted that promises or comments, although not explicit in their content, can be interpreted by employees as a "fist inside a velvet glove." **NLRB v. Exchange Parts Compeny**, 375 U.S. 405, 84 S.Ct. 457 (1964) @ p. 460. They could likewise be so interpreted by a jury!

judgment. This Court said in U.S. v. Diebold, Inc., supra, at 994:

> "In any event both findings represent a choice of inferences to be drawn from the subsidiary facts contained in the affidavits, attached exhibits, and depositions submitted below. On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." (Emphasis Added)

This has been reaffirmed many times since. Adickes v. S. H. Kress & Co., supra; Anderson v. Liberty Lobby, Inc., supra.

Only the fact finder can make the determination of Yelverton's intent in making these statements and this must be done in light of all the evidence and after personally observing his demeanor as a witness on cross-examination. The presumptions applied by both lower Courts, that these statements had only lawful intent, foreclosed Moore from

being able to meet the other test prescribed by **Burdine** by showing discrimination with "direct evidence." Moore believes that these remarks constitute "direct evidence" of an unlawful age-related motive, and that a jury could so find!

CONCLUSION

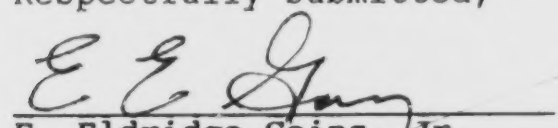
Moore found himself cut off from showing discrimination by either of the two **Burdine** alternatives. His attempt to prove discrimination by direct evidence was met with a judicial presumption of lawful motives, and his attempt to establish pretext by showing that Lilly's version was "unworthy of credence" was met with the "pretext-plus" requirement that such evidence is insufficient unless evidence of age discrimination is self-contained therein. His prima facie case evidence created no inference whatsoever of discrimination.

The confusion in the lower Courts concerning the statement in **Burdine** regarding proof of pretext by a showing that the employer's reason is "unworthy of credence" caused this Court to take jurisdiction in the **St. Mary's** case to attempt to clarify that confusion. Doubt, however, still prevails with regard to the same issue at the summary judgment stage of a discrimination case. Relying on the statement in **Burdine**, Moore attempted to prove that Lilly's reasons advanced in its Motion for Summary Judgment were "unworthy of credence", but this was held to be insufficient and the standard used was whether or not Moore's pretext evidence itself showed "Lilly's discriminatory intent." Both Opinions in **St. Mary's** acknowledge that the "unworthy of credence" test is "alive and well" at the time of trial if a prima facie case also exists.

Logically, this test must likewise be applicable at the summary judgment stage, or the trial stage will seldom be reached - as noted by the Dissent in **St. Mary's**.

The instant case affords the Court a prompt opportunity to put to rest any doubt by granting this Petition or, alternatively, by remanding this case to the Trial Court with instructions that Moore's pretext evidence be reevaluated under the "unworthy of credence" standard, and that on a Motion for Summary Judgment inferences drawn from the evidence are to be adverse to the moving party.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 92-1770

JIMMY G. MOORE,

Plaintiff-Appellant,

versus

ELI LILLY & CO.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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Before GOLDBERG, GARWOOD, and WIENER, Circuit Judges.

WIENER, Circuit Judge.

In this appeal of an age discrimination case,[1] Plaintiff-Appellant Jimmy G. Moore asserts that the district court erred in granting summary judgment in

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[1] See 29 U.S.C. § 621 et seq.

favor of Defendant-Appellee Eli Lilly & Co. (Lilly). Moore argues that the district court improperly imposed a "pretext burden" on him, and that there were genuine issues of material facts concerning whether Lilly's proffered reason for dismissing him was pretextual. Our plenary review of the summary judgment evidence places us in agreement with the district court's grant of summary judgment in favor of Lilly, so we affirm.

I.

FACTS AND PROCEDURAL HISTORY

Moore worked for Lilly for over thirty years. None disputes that during his time with Lilly, Moore had always been a satisfactory salesman. His employment was terminated by Lilly in October 1990, however, for "falsifying sample records." At the time of his discharge, Moore was fifty-nine years old.

Lilly, in compliance with the Prescription Drug Marketing Act of 1987,[2] operated a system to track the drug samples distributed to physicians by salespersons. Under Lilly's system, all salespersons were required to send "call cards" to Lilly each day, reporting the day's distributions of samples to doctors. Each salesperson's daily reports were checked against an inventory of his or her samples conducted at the end of each quarter. If the results of the inventory revealed a discrepancy with totals from the salesperson's call cards, he or she was considered to be "out of balance," and the disparity would have to be reconciled. A salesperson's inability to reconcile a discrepancy could result in his or her 1) being required to submit daily logs, or 2) being terminated.

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[2] See 21 U.S.C. § 353.

Moore was out of balance for the second quarter of 1990. After discussing the discrepancy with Kathy Hagerman, who worked in Lilly's "sample accountability department," Moore sent a letter to that department requesting that his records be altered to reflect a different distribution of samples. The purpose of this letter was to correct the discrepancy. It was later discovered that the modified record of samples distribution, as reflected in the letter Moore sent to the sample accountability department, could not have been correct; Moore apparently never had on hand a sufficient supply of samples to make possible the distributions that his letter asserted he had made.[3] Hagerman informed Moore that

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[3] The discrepancy involved samples of two types of medication: "Axid 150" and "Axid 300." In his letter to the sample accountability department, Moore stated that, although his original reports had

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the distribution set forth in the letter was not possible in view of the stock he had possessed during the relevant time. In response, Moore requested that Hagerman return his letter, but she refused. Lilly terminated Moore's employment, believing that this incident constituted a falsification of company records.

On October, 12, 1990, Moore met with his supervisor, Charles Yelverton. He informed Moore that his termination was based on falsification of the sample records. After Moore wrote to Lilly's Board chairman complaining about the termination, two Lilly executives went to

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reflected that he had distributed Axid 150, he had actually distributed Axid 300. Hagerman later discovered that during the time relevant to the letter, Moore did not have a sufficient quantity of Axid 300 to make the distribution, which was set forth in the letter, possible.

Dallas and met with Moore.[4] As a result of that meeting, Moore's termination date was modified to reflect an effective termination date of December 31, 1990.

Moore filed an age discrimination charge against Lilly with the EEOC. Before any resolution was made of that charge, though, Moore brought the instant action in the district court. In its opinion, the district court assumed that Moore had made out a prima facie case. In response, Lilly asserted a non-discriminatory basis for the termination--i.e., the falsification of sample records--which the court found to be legitimate. Subsequently, the district court granted summary judgment in favor of Lilly, finding that Moore had failed to present any evidence to

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[4] These executives were Thomas Coyne, Director of Personnel, and Dick Wojcik, a Vice-President.

demonstrate that the legitimate, non-discriminatory reason articulated by Lilly was pretextual. Moore timely appealed.

II.

ANYALSIS

A. Standard of Review

It is well established that, on appeal from a district court's grant of summary judgment, we review the record "under the same standards which guided the district court."[5] The standards we apply are set out in the Supreme Court trilogy of Anderson v. Liberty Lobby, Inc.,[6] Celotex Corp. v. Gatrett,[7] and Matsushita Electric Industrial Co. v. Zenith Radio Corp.[8] Summary judgment

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[5] Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988).

[6] 477 U.S. 242 (1986).

[7] 477 U.S. 317 (1986).

[8] 475 U.S. 574 (1985).

is proper when no issue of material fact exists and the moving party is entitled to judgment as a matter of law.[9] In determining whether summary judgment was proper, all fact questions are viewed in the light most favorable to the non-movant. Questions of law are reviewed, as they are in other contexts, de novo.[10]

B. Shifting Burdens in ADEA Claims

The litany of cases in this court establishing the alternating burdens to be carried by the parties to an age discrimination case, like the litany of those creating our standard of review for grants of summary judgment, is a long and well established one. As there is no direct evidence of age discrimination in

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[9] Fed. R. Civ. P. 56(c); see Celotex, 477 U.S. at 323-25.

[10] Walker, 853 F.2d at 358.

the instant case, "a three step analysis applies."[11] In the first step, the plaintiff must prove a prima facie case by demonstrating that he or she was (1) discharged; (2) qualified for the position; (3) within the protected age class-over 40-at the time of discharge; and (4) replaced by someone outside of the protected age class-under 40-or was otherwise discharged because of his or her age.[12]

By proving a prima facie case, the employee establishes a rebuttable presumption that the employer unlawfully discriminated against the employee. The employer may then negate this presumption by articulating a legitimate, non-discriminatory reason for its action.

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[11] Hanchey v. Energas Co., 925 F.2d 96, 97 (5th Cir. 1990).

[12] Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1504-05 (5th Cir. 1988).

If the employer articulates such a reason, and on summary judgment produces sufficient evidence to support the reason thus articulated, "the burden reverts to the plaintiff to prove that the employer's reason[] [is] pretextual."[13] "The plaintiff can show pretext by introducing evidence which proves that the reason stated by the employer, 'though facially adequate, was untrue as a matter of fact or was, although true, a mere cover or pretext' for illegal discrimination."[14] Stated another way, the plaintiff may prove pretext by "either showing that . a discriminatory

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[13] Normand v. Research Inst. of Am., Inc., 927 F.2d 857, 859 (5th Cir. 1991) (citing Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 646 (5th Cir. 1985), which cited Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 248, 253-55 (1981)).

[14] Id. (quoting Eliott v. Group Medical & Survical Servs., 714 F.2d 556, 566 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984)).

reason motivated the defendant or by showing that the proffered reason is unworthy of credence."[15]

To overcome a motion for summary judgment, of course, the plaintiff need only produce evidence to create a genuine issue of material fact concerning pretext.[16] It is clear, however, that the plaintiff's summary judgment proof must consist of more than "a mere refutation of the employer's legitimate nondiscriminatory reason."[17] To demonstrate pretext, the plaintiff must do more than "cast doubt on whether [the employer] had just cause for its decision"; he or she must "show that a reasonable factfinder could conclude that [the employer's]

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[15] Hanchey, 925 F.2d at 98.

[16] See Fed. R. Civ. P. 52(a).

[17] Bienkowski, 851 F.2d at 1508 n.6 (rejecting the Third Circuit's standard as discussed in Chippollini v. Spencer Gifts, 814 F.2d 893 (3 Cir. 1987)).

reason[] [is] unworthy of credence."[18] Specifically, "[t]here must be some proof that age motivated the employer's action, otherwise the law has been converted from one preventing discrimination because of age to one ensuring dismissals only for just cause to all people over 40."[19]

C. Moore's Claim of Age Discrimination

The district court assumed that Moore had established a prima facie case of age discrimination. As Lilly does not contest this point on appeal, and all of the elements are clearly met, we make the same assumption.

Lilly asserted as its legitimate, non-discriminatory reason for Moore's termination that he was discharged because he falsified the records

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[18] Hanchey, 925 F.2d at 99.

[19] Bienkowski, 851 F.2d at 1508 n.6 (citing White v. Vathally, 732 F.2d 1037 (1st Cir. 1984)).

discussed above. In support of this contention, Lilly presented considerable deposition testimony by Moore and others. It is clear to us, as it was to the district court, that the cognizant executives of Lilly could have reasonably believed that Moore requested the alteration of his sample distribution records without verifying what he had distributed to the doctors. When he was informed of the impossibility of the distribution under the alteration that he had requested in his letter, he immediately asked that the letter be returned to him. From these actions Lilly could have reasonably inferred that Moore had something to hide, namely, his falsification of the drug sample records. Such a reasonable belief by Lilly is undeniably a legitimate, non-discriminatory reason for its termination of Moore's employment. The fact that the employers, reasonable

belief eventually proves to have been incorrect--if, for example, Moore were eventually to be vindicated from the charges of falsifying records would not change the conclusion that the firing had been non-discriminatory. To survive summary judgment, therefore, Moore had the burden of producing some evidence that Lilly's proffered explanation is mere pretext. In the language of Hanchey, Moore had to "carr[y] [his] burden of showing a genuine issue of fact regarding the pretext issue."[20] Our review of the summary judgment evidence satisfies us that Moore simply failed to meet this burden.

Moore misapprehends the burden shifting process. At times, he even appears to argue that he has no pretext burden at all. He complains that the

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[20] Hanchey, 925 F.2d at 98.

trial court improperly ruled that his "prima facie proof was not itself sufficient to raise any inference whatsoever that Moore's age was the motive." Moore thus demonstrates his belief that his prima facie case is sufficient to meet his second evidentiary burden of demonstrating a genuine issue of material fact regarding pretext in order to defeat Lilly's summary judgment motion. This belief in turn demonstrates Moore's failure to grasp fundamental principles of this area of law.

Moore cites, inter alia, an Eighth Circuit case, Hicks v. St. Mary's Honor Center,[21] for the proposition that "after 'pretext' has been established," the prima facie case can have an impact on the case in favor of the plaintiff. We agree with our Eighth Circuit colleagues

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[21] 970 F.2d 487 (8th Cir. 1992).

that if a plaintiff is able to demonstrate that the employer's facially legitimate, non-discriminatory reason for its action is pretext, the inference created by the prima facie case could well be the basis for a favorable verdict for the plaintiff. The plaintiff need not necessarily respond to defendant's non-discriminatory reason if (but only if) plaintiff anticipatorily demonstrated in his or her prima facie case that the reason was pretext.[22] In Hicks, for example, the plaintiff had "proved all of defendants' proffered reasons for adverse employment actions to be pretextual." Following the plaintiffs' discrediting of all of the defendants's proffered reasons for their actions,

> defendants were in a position of having offered no legitimate reasons for their actions. In other words, defendants were in no better position than if they

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[22] See id. at 492.

> had remained silent, offering no rebuttal to an established inference that they had unlawful discriminated against plaintiff on [an illegal basis].[23]

Moore's problem, however, is his total failure to produce any evidence of pretext, either in connection with establishing his prima facie case or subsequently in response to Lilly's demonstration of a non-discriminatory reason for its action. He protests that the direct court imposed on him a new "pretext burden" which the court plucked from the wording of our Hanchey opinion. Not so. The district court was merely requiring Moore to do what all of the relevant case law demands that he do: produce some evidence of pretext.[24]

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[23] Id. at 492.

[24] In his brief to this court, Moore argues that "footnote 6 [of the Bienkowski, opinion] cannot be read to

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Moore attempts, in two assertions, to produce satisfactory evidence that Lilly's reason for his termination was

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establish a new 'pretext burden.'" Moore goes on to state that such a burden cannot "be harmonized with Burdine, other Fifth Circuit cases, and the views of other [c]ircuits," and he implies that such a burden would make victory impossible for an ADEA plaintiff.

In the, hope of forestalling the unnecessary expenditure of plaintiffs' funds and judicial resources through the filing of flawed age, discrimination cases, we have reviewed exhaustively the circuit's published opinions in ADEA cases that are the progeny (since 1988) of Green, Burdine, Thornbrough, or Bienkowski. Our review shows that when an ADEA plaintiff can produce valid evidence of pretext after the employer has proffered a legitimate, non-discriminatory explanation for its action, the plaintiff can succeed. See Ramirez v. Allright Parking El paso, Inc., 970 F.2d 1372, 1377 (5th Cir. 1992); Lloyd v. Georgia Gulf Corp., 961 F.2d 1190, 1194,95 (5th Cir. 1992); Walther v. Lone Star Gas Co., 952 F.2d 119, 122-24 (5th Cir. 1992); Wilson v. Monarch Paper Co., 939 F.2d 1138, 1146-47 (5th Cir. 1991); Normand Research Inst. of Am., Inc., 927 F.2d 857, 862-64 (5th Cir. 1991); Young v. City of Houston, 906 F.2d 177, 182 (5th Cir. 1990); Daloach v. Delchamps, Inc., 897 F.2d 815, 818-19

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pretext: (1) that a series of comments made by his supervisor, Yelverton, demonstrated discriminatory intent in

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(5th Cir. 1990); Burns v. Texas City Refining, Inc., 890 F.2d 747, 749-51 (5th Cir. 1989); Hansard v. Pepsi Cola Metro Bottling Co., 865 F.2d 1461, 1465-66 (5th Cir 1989); Uffelman v. Lone Star Steel Co., 863 F.2d 404, 407-08 (5th Cir. 1989). In a smaller but significant number of cases, to which the instant case may be added, ADEA plaintiffs who fail to meet their burden to produce some valid evidence of pretext are unsuccessful. See Waggoner v. City of Garland, __ F.2d __, 1993 WL 81530 (5th Cir.) (affirming the grant of summary judgment in favor of defendant); Guthrie v. Tifco Indus., 941 F.2d 374, 378 (5th Cir. 1991) (same); Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 813-14 (5th Cir. 1991) (same); Hanchey v. Energas Co., 925 F.2d 96, 98-99 (5th Cir. 1990) (same); Little v. Republic Refining Co., 924 F.2d 93, 96-98 (5th Cir. 1991) (affirming grant of JNOV in favor of defendant); Molnar v. Ebasco Constructors, Inc., 986 F.2d 115, 1993 WL 59042, *3 (5th Cir.) (reversing jury verdict that had been rendered in favor of plaintiff); Laurence v. Chevron, U.S.A., Inc., 885 F.2d 280, 284-85 (5th Cir. 1989) (same). A fair reading of the latter set of cases, reveals that the most prevalent flaw in the losing plaintiffs' evidence is the absence of proof of nexus between the firing (or failure

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connection with Moore's termination, and (2) that certain irregularities in the procedures followed by Lilly in connection with Moore's termination demonstrate discriminatory intent. As we shall explain, however, none of Moore's evidence establishes a sufficient nexus between his age and his termination to create a genuine issue of material fact concerning pretext. It cannot therefore defeat Lilly's motion for summary judgment.

1. Yelverton's Comments

Moore asserts that a number of comments made by his supervisor demonstrates

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to promote) and the allegedly discriminatory acts of the employer. In our survey, we found only two ADEA cases in which the plaintiff failed to produce evidence sufficient to make out a prima facie case. See Fields v. J.C. Penny Co., 968 F.2d 533, 536 (5th Cir. 1992); Crum v. American Airlines, Inc., 946 F.2d 423, 428-29 (5th Cir. 1991).

that he had a bias against older workers in general, and Moore in particular. Phrased in the vernacular of our prior opinions, Moore is asserting that even if Lilly's stated reason is facially valid, it is "a mere cover or pretext for illegal discrimination"-- i.e., that "a discriminatory reason motivated [Lilly]."[25] Moore submits that his termination was a product of the discriminatory intent evidenced by Yelverton's remarks and was not a product of the drug record falsification reason given by Lilly. Not only do the statements that Moore attributes to Yelverton fail directly to refute Lilly's explanation of Moore's termination as pretextual, they fail to demonstrate discriminatory intent vel non.

Moore asserts that when Yelverton learned that he was going to become the

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25 See supra notes 14-15 and accompanying text.

supervisor of the division in which Moore worked, Yelverton asked the outgoing supervisor a series of questions concerning the ages of the current employees and whether any of the older employees planned to retire soon.[26] These questions, however, cannot be said to represent, as Moore asserts, a discriminatory intent by Yelverton. Without more, they merely demonstrate a new supervisor's reasonable inquiries about the ages of the members of his work force and their known plans for the future--facts on which to guage the anticipated longevity of his crew.[27]

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[26] The former supervisor stated, in a deposition that Yelverton specifically, asked about Moore's retirement plans when he learned of Moore's age.

[27] In Burns v. Texas City Refining, 890 F.2d at 750-51, we found that the plaintiff had demonstrated pretext, and one part of his proffered evidence consisted

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The other set of statements that Moore proffers as proof of discriminatory intent concerning his termination are two more Yelverton remarks that simply do not have any negative implications about Moore or his age. The first was a comment made by Yelverton when the he and Moore were on a sales call together. Yelverton stated that if he were in Moore's position he would be out seeing the world. Such musings about eventual retirement simply do not evidence

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of a supervisor's inquiry concerning plaintiff's age. In Burns, however, the inquiry, which itself did not demonstrate discriminatory animus, was accompanied by the fact that the supervisor knew of savings in pension payments that could be realized if older workers were dismissed, and that specific efforts had been made to induce Burns to leave before his termination. See id. In the instant case, however, there is nothing more than an inquiry by a new supervisor concerning the age of his workforce. We cannot infer discriminatory animus from that inquiry.

discriminatory intent. Neither do tasteless but innocuous "pottie humor" comments, such as one made by Yelverton to Moore.[28]

Moore adds that he was told by other Lilly supervisors not to recommend people over thirty-five years of age for new sales. positions. The implication of that advice--that Lilly wanted to make training investments in employees of an age that would predict long range employment--is not indicative of age bias and certainly did not affect Moore, who long before had been hired as a salesman. Moore also stated in a deposition that he was the oldest man in the district office. But again, the fact that the

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[28] Specifically, when Yelverton and Moore were in a restroom at the same time, Yelverton stated that Moore "had a strong stream for an old man." Although this comment demonstrates that Yelverton might have been less than genteel at times, it fails to demonstrate discriminatory animus.

oldest employee in the district was terminated simply does not demonstrate that the facially age-neutral reason Lilly offered for that termination was pretextual.[29]

2. The Circumstances of Moore's Termination

Moore next claims that "the pretextual nature of Lilly's alleged reason for termination is obvious" from the facts surrounding his termination. With this argument, Moore continues his attempt to create a genuine issue of material fact regarding Lilly's stated reason, insisting that it is "a mere cover or pretext for illegal

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[29] Moore also insists that "a substantial raise was in the works [for him] and . . . that this led to Yelverton's sense of urgency in terminating him." Assuming that, this is true, we fail to see any relation whatsoever to Moore's age.

discrimination" or that "a discriminatory reason motivated [Lilly]."[30]

Moore argues that six facts surrounding his termination (noting that "the list could easily be continued") demonstrate Lilly's discriminatory intent. These facts, which for purposes of this review we assume to be true, are: (1) that Lilly has told inconsistent stories concerning the termination; (2) that Moore was terminated for "falsifying records" before Yelverton knew the elements of the offense; (3) that Yelverton varied Lilly's discharge procedures and disobeyed orders from his supervisors in deciding to terminate Moore; (4) that "Moore was terminated for attempting to correct a situation caused by someone else's mistake"; (5) that the sample accountability department only placed him

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[30] See supra notes 14-15, 23 and accompanying text.

on the daily log (a lesser penalty) but Yelverton decided to terminate him; and (6) that Yelverton "shot first and asked questions later"-- making his inquiry only after he terminated Moore. Concerning these six assertions, the district court stated: "While these conflicting accounts indicate a factual dispute as to exactly how Moore was terminated, their existence does not provide direct (or even indirect) proof that he was fired because of age." We agree.

Proof that an employer did not follow correct or standard procedures in the termination or demotion of an employee may well serve as the basis for a wrongful discharge action under state law. As we have stated, however, the ADEA was not created to redress wrongful discharge simply because the terminated worker is

was over the age of forty.[31] A discharge may well be unfair or even unlawful yet not be evidence of age bias under the ADEA. To make out an ADEA claim, the plaintiff must establish the existence of discrete facts that show some nexus between the employment actions taken by the employer and the employee's age. Here, there is no demonstrated connection other than Moore's bald assertion that one exists. That simply will not suffice.

III

CONCLUSION

Moore, like so many other ADEA claimants before him, has failed to produce summary judgment evidence capable of showing the existence of a genuine issue of material fact on the pretext issue. Agreeing with the district court's

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[31] See Bienkowski, 851 F.2d at 1508 n.6.

well-reasoned opinion that explain the court's grant of Lilly's motion for summary judgment, we

AFFIRM.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JIMMY G. MOORE	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
VS.	)	
	)	3:91-CV-1644-G
ELI LILLY & COMPANY	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

Before the court is the motion for summary judgment of defendant Eli Lilly and Company ("Lilly"). For the reasons stated below, the motion is granted.

I. BACKGROUND

This action under the Age Discrimination in Employment Act ("the ADEA"), 29 U.S.C. § 621 *et seq.*, arises from Lilly's decision to terminate the employment of the plaintiff, Jimmy G. Moore ("Moore"). Moore began working for Lilly in the pharmaceutical sales division in 1959.

At the time of his termination, he was 59 years old.

In 1988, to assure compliance with the Prescription Drug Marketing Act of 1987, 21 U.S.C. § 353 (the "PDMA"), Lilly instituted internal procedures requiring pharmaceutical sales personnel to complete and return documentation regarding drug samples distributed to physicians (the "sample accountability procedures"). Under the sample accountability procedures, Moore was required to maintain "call cards" identifying the quantity and type of drug given to each physician. At the end of each quarter, Moore had to submit an inventory sheet showing the quantity of each drug sample in his possession, along with the call cards pertaining to that quarter. After logging this information, the sample accountability department would notify Moore of any discrepancies between the amounts he

claimed to have distributed and the inventory balance he reported. Moore was then required to account for or explain any discrepancies. Failure to do so could result in a requirement that Moore submit daily logs or, alternatively, in termination.

Following the second quarter of 1990, Moore was informed that he was "out of balance" due to a discrepancy between the amount of drugs he claimed to have given out as samples and the final inventory. When Moore was unable to resolve this discrepancy, he contacted the sample accountability department. After discussing the situation with Kathy Hagerman ("Hagerman"), Moore wrote to Hagerman requesting that a number of his call cards be altered to reflect that in April of 1990, he had erroneously marked the distribution of Axid 150 while actually distributing Axid 300. Hagerman later

learned from the shipping department that Moore had not been shipped any samples of Axid 300 before April of 1990. When Hagerman related this information to Moore, he asked that she return the letter requesting the change. Hagerman refused.

On October 12, 1990, Moore met with his supervisor, Charles Yelverton ("Yelverton"). During the meeting, Yelverton informed Moore that he was being terminated for falsifying his sample records. When asked by Yelverton if he wished to discuss the situation further, Moore declined and tendered his resignation, which was accepted by Yelverton. Moore then wrote to Lilly's Chairman of the Board complaining about his termination. Shortly thereafter, Thomas Coyne, Director of Personnel ("Coyne"), and Dick Wojcik, Vice-President ("Wojcik") flew to Dallas

to meet with Moore regarding his termination. As a result of the meeting, Moore's termination was modified to reflect an effective date of December 31, 1990.

On April 8, 1991, Moore filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Before the EEOC made any determination of that charge, Moore brought this action on August 15, 1991.

II. ANALYSIS

A. Evidentiary Burdens on Motion for Summary Judgment

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R.Civ. P. 56(c).[1] "[T]he

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[1] The disposition of a case through summary judgment "reinforces the purpose

Footnote continued on next page.

substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The movant makes such a showing by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues. *See Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant makes this showing, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Id.* at 323-24. To carry this burden, the opponent must do more than

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Footnote continued from previous page.

of the Rules, to achieve the just, speedy and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expenssive." *Fontenot v. Upjohn Company*, 780 F.2d 1190, 1197 (5th cir. 1986).

simply show some metaphysical doubt as to the material facts. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586 (1986). Instead, he must show that the evidence is sufficient to support a resolution of the factual issue in his favor. *Anderson*, 477 U.S. at 249. All of the evidence must be viewed, however, in a light most favorable to the motion's opponent. *Id.* at 255 (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). Summary judgment is properly entered against a party if after adequate time for discovery, he fails to establish the existence of an element essential to his case and as to which he will bear the burden of proof at trial. *Celotex*, above, 477 U.S. at 322-23.

B. Evidentiary Burdens in an Employment Discrimination Case

The allocation of evidentiary burdens in an employment discrimination case

is well-established. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-16 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-58 (1981); *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 800-05 (1973). Initially, an employee must establish a *prima facie* case of discrimination by proving that (1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class at the time of discharge; and (4) he was replaced by someone outside the protected class or can otherwise show that his discharge was because of his age. *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1504-05 (5th Cir. 1988). The establishment of a *prima facie* case creates a rebuttable presumption that the employer unlawfully discriminated against the employee, requiring the employer to

articulate a legitimate, nondiscriminatory reason for its decision to terminate. *Burdine*, 450 U.S. at 253-54.

If the employer satisfies the burden of articulating a legitimate, nondiscriminatory reason for its action, the presumption of discrimination is negated, and the burden of production shifts back to the employee to provide, by a preponderance of the evidence, that the nondiscriminatory reason proffered by the employer was not the true reason for the adverse employment decision. The employee must, at "a new level of specificity," prove that the employer's articulated explanation of its conduct is probably pretextual. *Aikens*, 460 US. at 715 (quoting *Burdine*, 450 U.S. at 255); *see also McDonnell Douglas*, 411 U.S. at 802-05.

C. **Pretext**

In *Texas Department of Community Affairs v. Burdine*, above, the Supreme Court succinctly summarized the hurdle an employee must surmount to prove pretext.

> [Plaintiff's] burden now merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination. [Plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. at 256. The Court has been consistent in allocating this burden to the employee in any case in which employment discrimination is alleged. *See, e.g., Aikens*, 460 U.S. at 715-16.

In a line of cases beginning with *Thornbrough v. Columbus and Greenville Railroad Company*, 760 F.2d 633 (5th Cir. 1985), the Fifth Circuit has explored the relationship between the burden of proof an employee plaintiff alleging age discrimination would have a trial and his

burden in resisting a motion for summary judgment filed by the employer. In *Thornbrough*, Judge Goldberg explained that on summary judgment the issue for decision "is not whether the plaintiff proves pretext, but rather whether the plaintiff raises a genuine issue of fact regarding pretext." 760 F.2d at 646. Because the plaintiff in that case had produced evidence questioning the truth of the employer's reasons for termination, the court held that summary judgment was improperly granted for the employer. *Id.* at 646-48.

The Fifth Circuit clarified the test for establishing pretext in *Bienkowski v. American Airlines, Inc.*, above, another age discrimination case. There the court made it clear that an employees' burden on summary judgment is more than a mere refutation of the nondiscriminatory reasons articulated by the employer.

Bienkowski, 851 F.2d at 1508. Rather, the employee has to provide specific evidence, "such as 'direct' evidence of age discrimination, information about the ages of other employees in plaintiff's position, the treatment and evaluation of other employees, or the employer's variation from standard evaluation practices." *Id.*[2] Providing insight into its purpose in formulating such a list of examples, the court reasoned in a footnote that "[t]here must be some proof that age motivated the employer's action,

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[2] In the present case, Moore has produced virtually no evidence of this type. He has failed to point out any facts suggested that Lilly treated its older workers differently than its younger ones. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983) ("[t]he 'factual inquiry' in [an employment discrimination] case is '[whether] the defendant intentionally discriminated against the plaintiff'" by treating him less favorably than others outside the protected class). In fact, it is Lilly which has provided evidence detailing its even-handed approach toward its entire workforce.

otherwise the law has been converted from one preventing discriminating because of age to one ensuring dismissals only for 'just cause.'" *Id.* n.6.

The latest in this line of cases is *Hanchey v. Energas Company*, 925 F.2d 96 (5th Cir. 1990), also an age discrimination dispute. In that case, the court repeated the language found in footnote 6 of the *Bienkowski* decision and reiterated that if the employee attempts to demonstrate pretext indirectly, i.e., by showing that the employer's proffered reason is unworthy of credence, his proof "must extend beyond casting doubt on the unreasonableness of the employer's action." *Hanchey*, 925 F.2d at 98. Taken as a group, these cases clearly require that a plaintiff resisting summary judgment in an age-discrimination case do more than simply present facts to refute the movant-employer's articulated reasons for

termination. Instead, they outline a distinct "'pretext' burden," in the language of *Hanchey*, 925 F.2d at 98, that requires some proof of an age-motivated employment decision.

In the case at bar, the court will assume, for purposes of this motion, that Moore has established a *prima facie* case of age discrimination. Against the backdrop of this *prima facie* case, Lilly's articulated reason for its decision to terminate Moore, viz., a falsification of sample records, is undeniably legitimate and nondiscriminatory. Moore thus has the burden of demonstrating that Lilly's explanation for his termination is pretextual.

Moore identifies several facts in his attempt to satisfy this burden. He first contends that his discharge was improper because he did not falsify records or violate the PDMA, but merely

mismarked sample cards. He further claims that it is not Lilly's ordinary policy to terminate a sales representative merely for being out of balance on the quarterly sample accountability reports.[3] Citing *Bienkowski*, 851 F.2d at 1508, Moore maintains that this departure from Lilly's usual company policy mandates a finding that the proffered explanation is pretextual. Additionally, he asserts that because Lilly provided a printed form specifically used for correcting mismarked call cards, it could not have considered that such occurrences

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[3] In the two years prior to Moore's termination, Lilly placed fifteen sales representatives on daily log for errors in marking cards or inventory sheets. three of these representatives were over the age of fifty at the time that discipline was imposed. During the same period, eleven sales representatives were terminated for dishonesty or falsification of sales accountability records, including five under the age of forty, four between the ages of forty and fifty, and two (including Moore) who were 50 years of age or older.

would constitute a falsification of records justifying dismissal.

No evidence in the record, however, supports Moore's contention that he was dismissed for merely mismarking call cards. Nor has Lilly ever intimated that Moore was terminated for any violation of the PDMA. On the contrary, what led to Moore's dismissal were his actions -- taken as a whole -- after he was informed that he was out of balance for the second quarter of 1990. Moore's contention that he was discharged for mismarking call cards cannot, on the present record, be taken seriously.

Bienkowski held that a variation from a standard practice is relevant only when it provides "direct evidence" of age discrimination. 851 F.2d at 1508. Because Moore has produced no evidence that Lilly's practice is meting out discipline to sales representatives within

the protected class for errors in sample accountability or falsification of records differed from its practice in that regard for sales representatives outside that class, *Bienkowski* teaches that if there is any variation here, it is irrelevant.[4] Furthermore, even if the court could find that Lilly acted unreasonably in terminating Moore rather than placing him on daily log, this finding would be insufficient without additional proof that Lilly's explanation for Moore dismissal was in reality a pretext for age discrimination. See *Hanchey*, above, 925 F.2d at 98.

Finally, Moore contends that a factual dispute exists regarding which of

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[4] Lilly has produced uncontradicted evidence that its treatment of sales representatives with regard to discipline or termination was not based on age. See note 3, above. It naturally follows that Lilly's proffered explanation for Moore's termination is not pretextual. See *Bienkowski*, 851 F.2d at 1508.

his superiors at Lilly made the actual decision to terminate him. He maintains that the decision was made by Yelverton, and that because Yelverton had made certain comments to Moore regarding retirement and age, a genuine issue of material fact exists as to whether Yelverton in truth dismissed him because of his age rather than for falsification of records. Additionally, Moore argues that Lilly's own agents have proffered inconsistent versions as to how he was fired and that the existence of these conflicting versions creates a factual dispute on the issue of pretext.

Neither of Moore's arguments regarding the manner in which he was fired suggests that Lilly's reason for termination was really a pretext for age discrimination. Even if Yelverton made the statements attributed to him by Moore, they do not show that Lilly's articulated reason

for the decision to terminate Moore was pretextual. *See Simmons v. McGruffey Nursing Home, Inc.*, 619 F.2d 369, 371 (5th Cir. 1980) (affidavit that board member of defendant employer was overheard to say, while considering a replacement for plaintiff, "we want a younger man this time" insufficient to defeat summary judgment); *Guthrie v. Tifco Industries*, 941 F.2d 374, 379 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1267 (1992) ("stray remarks" insufficient to establish age discrimination). Merely inquiring about an employee's future plans for retirement is not sufficient to show that a subsequent termination was based on age. To so hold would have a chilling effect on the ability of an employer to conduct its business by , e.g., ascertaining the need for training programs for new employees or

for changes to the employer's retirement programs.

Moore's assertion that a reasonable jury could find pretext, on the basis of conflicting stories regarding the manner in which he was terminated, is also unconvincing.[5] *Bienkowski* requires some proof that age was a motivating factor in the decision to terminate. 851 F.2d at 1508, n.6. While these conflicting accounts indicate a factual dispute as to exactly *how* Moore was terminated, their existence does not provide direct (or even indirect) proof that he was fired because of *age*. Moore thus fails, in the words of *Hanchey,* 925 F.2d at 98, to

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[5] Moore contends that the following conflicting versions have been given by Lilly employees as to how the decision to terminate him was reached: (1) upper managemente decided to fire him after meeting with him in Dallas; (2) upper management decided to have Yelverton confront him but not terminate him; and (3) Yelverton attended a meeting in which the decision to discharge him was made.

"carry [his] 'pretext' burden."[6] *See Anderson*, 477 U.S. at 256 ("the movant [for summary judgment] has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict"). If Moore could prevail on the basis of such conflicts, then any inconsistent testimony by the employer's agents about the circumstances surrounding an employee's termination would be sufficient to defeat summary judgment. This, however, is not the law. *See Anderson*, above, 477 U.S. at 248 ("[o]nly disputes over facts that might affect the outcome of the suit will properly preclude the entry of summary judgment");

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[6] The Fifth Circuit rejected a similar argument in *Hanchey*, where plaintiff argued pretext on the grounds that her employer gave three shifting, conflicting reasons for terminating her employment, 925 F.2d at 98-99.

Celotex, above, 477 U.S. at 323 ("a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial").

III. CONCLUSION

A close reading of the cases discussed above clearly reveals that the burden of showing pretext requires more than Moore has provided here. Because Moore has not produced sufficient evidence to demonstrate that Lilly's explanation for his termination was probably a pretext for prohibited age discrimination, Lilly's motion for summary judgment is **GRANTED.**

SO ORDERED.

September 3, 1992.

A. Joe Fish
A. JOE FISH, United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-1770

JIMMY G. MOORE,

Plaintiff-Appellant,

versus

ELI LILLY & CO.,

Defendant-Appellee.

Appeal from the United States District
for the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 04/30/93, 5 Cir., ____, _____ F.2d _____)

(May 25, 1993)

Before GOLDBERG, GARWOOD, and WIENER, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in acti·e service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

J. WIENER, J.
United States Circuit Judge

Judge Jones did not participate in the consideration of the suggestion for rehearing en banc.

(Sep 21, 1998)

SAMPLE ACCOUNTABILITY
CALL CARD CORRECTION FORM

USE ONE FORM PER CALL CARD TO BE CORRECTED
SEE INSTRUCTIONS ON BACK OF FORM

SALES REPRESENTATIVE _____ TERRITORY NO. _____

PLEASE PRINT

THE CALL CARD CHANGES ON THIS FORM HAVE BEEN DISCUSSED WITH SAMPLE ACCOUNTABILITY SERVICES BY TELEPHONE ☐YES ☐NO

PHYSICIAN REFERENCE NO. _____ PHYSICIAN NAME _____

INDICATE REASON FOR CORRECTION:

- ☐ ERASURE
- ☐ INCORRECT DATE RECORDED
- ☐ INCORRECT QUANTITY RECORDED
- ☐ INCORRECT ITEM RECORDED
- ☐ PHYSICIAN CALL CARD NOT RECEIVED/RECORDED
- ☐ OTHER _____

Val 122 Sep
Q Hall MC234
MARTHA WEISBACK

LIST THE INCORRECT SAMPLING INFORMATION AS RECORDED BY INDIANAPOLIS:

CALL DATE	PRODUCT ID	QUANTITY

LIST THE CORRECT SAMPLING INFORMATION AS IT SHOULD BE RECORDED ON THE CALL CARD:

CALL DATE	PRODUCT ID	QUANTITY

SIGNATURE _____ DATE _____ VOICE MAIL _____

HOME OFFICE USE ONLY

DEPT	FORM	MONTH	YEAR	TRANS CODE	TYPE	ITEM ID	QTY	TYPE	ITEM ID	QTY
MC234	63	____	____	10	I	_____	____	I	_____	____
MC234	63	____	____	10	I	_____	____	I	_____	____
MC234	63	____	____	10	I	_____	____	I	_____	____
MC234	64	____	____	10	I	_____	____	I	_____	____
MC234	64	____	____	10	I	_____	____	I	_____	____
MC234	64	____	____	10	I	_____	____	I	_____	____

TERRITORIAL SERVICES:

T.S. BATCH _____

SAMPLE ACCOUNTABILITY SERVICES:

COMPLETED BY _____

DATE SUBMITTED _____

RETURN TO SAMPLE ACCOUNTABILITY SERVICES MC 234, 1466
A PHOTOCOPY OF THE CALL CARD RECEIPT MUST BE ATTACHED

C

SAMPLE ACCOUNTABILITY

October 3, 1990

Mr. J. G. Moore (32-22-88)
cc: Mr. C. L. Yelverton (32-00-00)
Mr. T. E. Baucum (99-02-99)
Sample Accountability Territory File

RE: DAILY LOG STATUS

Our records indicate that your Sample Accountability Summary Report, for the Second Quarter 1990, remains unreconciled at this time. Administrative criteria requires that representatives with one unreconciled Quarterly Summary Report complete a daily sample log. This daily log status is in effect immediately and will remain in effect until your Third Quarter, 1990, Sample Accountability Summary Report is reconciled.

Enclosed is an initial quantity of daily logs to be completed. Further supplies can be ordered from the Promotional Materials Order Form. Please forward copies of your daily log to Sample Accountability Services (MC234, 1466) and your district manager on a weekly basis.

Regards,

Jeff Bobek
Jeff Bobek
Sample Accountability Services
(317) 276-1187

jaj
Enclosure

D

October 16, 1990

Mrs. Beverly Coffey:

RE: JIMMY G. MOORE PS32T

The termination date of employment for the above-named employee was October 12, 1990. He retired under our early retirement program.

In addition to 40 day's pay in lieu of vacation, he will receive pay for six special days and pro-rata vacation for 1990.

A signed sample statement has been returned to us from the district office. Check for $250.00 covering return of travel advance should be deducted from Mr. Moore's vacation pay.

Check for any mones due Mr. Moore should be forwarded to him.

Sally
Sally Leeper
Marketing Personnel

sl

cc: Mr. T. E. Baucum
Mrs. Sarah Hallstedt
Mr. G. B. Reynolds
Mr. C. L. Yelverton

Lilly

Eli Lilly and Company

Lilly Corporate Center
Indianapolis, Indiana 46285
(317) 276-2000

July 3, 1991

Ms. Carol Hawkins
Supervisor
Equal Employment Opportunity
Commission
Dallas District Office
8303 Elmbrook Drive
Dallas, Texas 75247

Re: EEOC Charge of Jimmy G. Moore
Charge No. 310911541

Dear Ms. Hawkins

In response to this charge, Eli Lilly and Company ("Lilly") denies that it has discriminated against Jimmy G. Moore because of his age. Mr. Moore's employment was terminated because of falsification of records concerning pharmaceutical sample accountability.

Mr. Moore began his career at Lilly in June of 1959 as a pharmaceutical sales representative in Texas. He continued in this capacity until his termination on October 12, 1990 (effective December 31, 1990). A copy of Mr. Moore's personal history folder is attached as Attachment 1.

The distribution of legend pharmaceutical samples is governed by the Prescription Drug Marketing Act (PDMA). Under the PDMA, Lilly is required to notify the

Food and Drug Administration (FDA) of all thefts, significant losses, and any of its sales representatives convicted of selling, trading, or purchasing samples. Violation of the PDMA may result in the sales representative being charged with a felony, and Eli Lilly and Company may be subject to civil penalties. The penalties for a sales representative's conviction of selling, trading, purchasing, or simply offering to sell, trade, or purchase samples are fines of up to $250,000 and possible imprisonment of up to ten years. In addition, the Company may be fined a sum up to $1,000,000 as the result of a sales representative's conviction. For these reasons, as well as others, Lilly takes very seriously its commitment to accuracy in the sample accountability reports prepared by each sales representative. Mr. Moore, like every other pharmaceutical sales representative at Lilly, was asked to read and sign a PDMA responsibility statement. A copy of his signed statement is attached as Attachment 2.

To ensure compliance with the PDMA, Lilly has established internal procedures requiring sales representatives to reconcile, no less than quarterly, their call cards (documenting samples left with physicians), sample shipping receipts, and individual monthly logs of samples in their possession with a company-generated printout called a quarterly sample accountability summary report ("QSAR").

Mailed to each sales representative about 45 days after the quarter's end, each QSAR is accompanied by a separate monthly sample accountability verification report ("SAVR") pertaining to that individual for each month in the quarter. Each QSAR and SAVR contains data on sample distribution and sample receipt by the sales representative, based on the call cards and shipment reports provided by the representative for entry into the company database. Each sales representative is expected to reconcile his/her own monthly sampling logs and outstanding call cards and shipping orders for samples for the months in the quarter with the QSAR and relevant SAVRs for the quarter, much in the same way that a consumer reconciles a checking account statement with his/her check register and outstanding checks. The information packet which accompanied Mr. Moore's second quarter 1990 QSAR and SAVRs is attached as Attachment 3. The desired goal is that each sales representative's samples reconcile with the company's records of the samples he/she has at the end of each quarter.

In late August, 1990, Mr. Moore received his second quarter 1990 QSAR. On September 6 and 7 Mr. Moore telephone Ms. Kathleen Hagerman of Lilly's Sample Accountability Services Department to discuss reconciliation of that QSAR. Mr. Moore stated that he had mismarked a number of his call cards by wrongly indicating he had sampled doctors with AXID® 150

mg. product (3x6 pulvules) when in fact he had handed out AXID® 300 mg. product (3x3 pulvules). He said he would check his receipts and would send a letter explaining and correcting the discrepancies and photocopies of all call card receipts and shipping orders requiring correction. On or about September 12, Ms. Hagerman received a letter from Mr. Moore, attached as Attachment 4, explaining the corrections to be made to his second quarter QSAR. She submitted the call card corrections he had noted in Attachment 4 to Territorial Services and notified Mr. Dave Hommel in Lilly's Sample Customer Service Department that Mr. Moore had noted that a shipping correction on AXID 150 mg. (1x60 pulvule) needed to be made. She then mailed a letter to Mr. Moore notifying him that his second quarter 1990 QSAR had now been reconciled.

On September 19, 1990, Ms. Hagerman received notification from Mr. Hommel that the shipping correction on AXID 150 mg. (1x60 pulvule) requested by Mr. Moore had been made. However, Mr. Hommel informed her that he had discovered another shipping error involving AXID 300 mg. (3x3 pulvule) whereby a 'backorder' had not been updated on a shipping order in April with the result that Mr. Moore had been shown on the QSAR to have possession of 100 more of this AXID 300 mg. (3x3 pulvule) sample product than he actually could have had in his

possession. In light of this information, Ms. Hagerman again reviewed Mr. Moore's report and discovered that if Mr. Moore had correctly reconciled his records with the QSAR and noted this discrepancy to Lilly, the AXID 300 mg. (3x3 pulvule) portion of his second quarter QSAR would have been reconciled to begin with. This meant that Mr. Moore did not have any AXID 300 mg. (3x3 pulvule) product to sample until after May 10, 1990, and therefore he could not have sampled them in April 1990 as his reconciliation letter in Attachment 4 stated.

On September 19, Ms. Hagerman advised Mr. Moore and his manager, Mr. Charles L. Yelverton, of the new discrepancy in his second quarter 1990 QSAR and asked Mr. Moore to explain. Ms. Hagerman also questioned whether the same type of discrepancy with regard to the AXID 150 mg. product might have existed in Mr. Moore's first quarter 1990 QSAR, which had been reconciled only after a similar type of reconciliation letter from Mr. Moore.

On September 20, 1990, Ms. Hagerman received a telephone call from Mr. Moore. He claimed to have discussed a possible shipping problem regarding AXID 300 mg. (3x3 pulvule) with her. Ms. Hagerman had no recollection or notes concerning such a conversation and told him that. Mr. Moore then asked her if she could destroy the letters he had sent regarding both the second quarter and the first quarter

1990 QSAR reconciliations. Ms. Hagerman refused to destroy the documents. Mr. Moore said he believed that his problems went back to the first quarter but that he was unable to identify what had gone wrong and that he wouldn't know where to begin to sort it out at this point. Ms. Hagerman offered to send him a detailed sampling summary for first quarter 1990, but Mr. Moore refused it. He requested that she contact his district manager to explain what was going on, which she did.

Upon notification of the new discrepancy, Mr. Yelverton (District Manager) contacted Mr. Moore, asking him to explain the discrepancy. When Mr. Moore failed to produce evidence that he did not change his records, Mr. Yelverton contacted line management and personnel in accordance with Lilly's disciplinary policy. This policy is listed in the Employee Handbook under Disciplinary Actions (Attachment 5). It states that an employee may be discharged immediately for dishonesty, including falsification of reports. The policy also states that a discharge action will not take place without thorough review and approval by the employee's department head, manager, director and members of the personnel department. Following this process, the decision was made to terminate Mr. Moore for falsification of records, unless he could provide new information. As a result, Mr. Yelverton and Mr. Greg Reynolds, the Regional Personnel

Representative, were asked to meet with Mr. Moore after the October District Sales meeting. They presented Mr. Moore with the falsification evidence and gave him an opportunity to introduce new information. Mr. Moore acknowledged that he sent the letter to Ms. Hagerman and was unable to provide new information to explain his actions. As a result, Mr. Yelverton communicated the decision that Mr. Moore's employment with Lilly would be terminated.

The decision to confront, and ultimately to terminate, Mr. Moore was based solely on Lilly's disciplinary procedure and was a joint decision between his line management and members of personnel. It should be noted that a decision to terminate any employee goes up through the Vice President of that business unit and the Vice President of Human Resources.

In summary, Lilly denies that it discriminated against Mr. Moore on the basis of his age.

Please direct any further communication on this matter to me at the following location.

P. Douglas Wilson
Director, Human Resources
Planning
Eli Lilly and Company
Lilly Corporate Center
Indianapolis, Indiana 46285
Telephone: (317) 276-5591

Very truly yours,

P. Douglas Wilson

P. Douglas Wilson
Director, Human
Resources Planning

PDW:ab

Enclosures

Supreme Court, U.S.
FILED
OCT 25 1993
OFFICE OF THE CLERK

No. 93-278

In The

Supreme Court of the United States

October Term 1993

JIMMY G. MOORE,

Petitioner,

v.

ELI LILLY AND COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN V. JANSONIUS
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Attorneys for Respondent Eli Lilly and Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did the District Court and Fifth Circuit Court of Appeals correctly find that there is no evidence in the summary judgment record upon which a reasonable finding could be made that Eli Lilly and Company's stated reason for terminating Mr. Moore's employment is a pretext for discrimination on account of age?

2. Can a litigant raise by Petition for Writ of Certiorari a legal issue not presented to the lower courts?

LIST OF PARTIES

Jimmy G. Moore

Eli Lilly and Company

Subsidiaries (non-wholly owned)
DowElanco

OBJECTION TO PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari exceeds the page limits set by Supreme Court Rule 22.2 by 14 pages. To the best of Respondents' knowledge, Petitioner did not get leave of Court to deviate from Rule 22.2. Respondent objects to inclusion of pages 31-45 of the Petition for Writ of Certiorari in the record.

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No. 93-278

In The

Supreme Court of the United States

October Term 1993

JIMMY G. MOORE,

Petitioner,

v.

ELI LILLY AND COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Eli Lilly and Company, Respondent, submits this Brief in Opposition to the Petition for Writ of Certiorari to United States Court of Appeals for the Fifth Circuit filed by Petitioner, Jimmy G. Moore

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 990 F.2d 812 (5th Cir. 1993), and the opinion of the District Court is reported at 802 F. Supp. 1468 (N.D. Tex. 1992). They are reproduced at pages A-1 and A-30,

respectively, of the Appendix attached to Moore's Petition for Writ of Certiorari. The per curiam opinion denying Mr. Moore's Petition for Rehearing and Suggestion for Rehearing En Banc is published at 993 F.2d 1545 (5th Cir. 1993).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on April 30, 1993, and Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc was denied by per curiam Order dated May 25, 1993. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(i).

STATUTORY PROVISIONS

The statute at issue in this case is the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623, which provides in relevant part:

> It shall be unlawful for an employer – (i) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

and § 631, which states:

> The prohibition in this chapter shall be limited to individuals who are at least 40 years of age.

STATEMENT OF THE CASE

Petitioner Jimmy G. Moore was discharged from his job as a pharmaceutical sales representative at Eli Lilly and Company effective December 31, 1990. He filed suit on August 25, 1991 claiming that he was discharged because of his age, in violation of section 4 of the Age Discrimination in Employment Act of 1974, 29 U.S.C. §§ 621-634. Lilly denied that age was the reason Moore was terminated. Instead, as Lilly has maintained all along, Moore was let go because Lilly believed he had falsified records used to monitor the distribution of pharmaceutical samples.

A. Proceeding Below.

After a period of approximately 10 months in which discovery was conducted, Lilly filed its Motion for Summary Judgment on June 5, 1992. Moore responded to Lilly's motion on June 25, 1992. On September 3, 1992 the United States District Court entered its Memorandum Order carefully analyzing the facts presented and granting Lilly's Motion for Summary Judgment.

Moore entered a timely notice of appeal, and filed his brief with the Fifth Circuit on November 10, 1992. Lilly filed its brief on December 24, 1992, followed by Appellant's Reply Brief filed January 6, 1993.

The Fifth Circuit scheduled oral argument in this case and counsel for Moore and counsel for Lilly appeared before Circuit Judges Irving L. Goldberg, William L. Garwood, and Jacques L. Weiner on April 30, 1993. That same day, following oral argument, the panel unanimously

affirmed the order and judgment entered by the District Court. 990 F.2d 812 (5th Cir. 1993). On the record before it, the Fifth Circuit held that there was no credible evidence whatsoever raising a genuine issue of fact concerning Lilly's stated reason for Moore's discharge. *Id.* at 819.

Mr. Moore petitioned the Fifth Circuit for rehearing and filed a Suggestion for Rehearing En Banc. No judge of the Fifth Circuit requested a poll be taken, however, and the Petition for Rehearing and Suggestion for Rehearing En Banc was denied per curiam on May 25, 1993. 993 F.2d 1545.

B. Statement of Facts.

The facts of this case are set out succinctly and accurately in the Fifth Circuit's opinion. 990 F.2d at 813-14. By stark contrast, the prolonged statement of facts on pages 9-21 of the Petition for Writ of Certiorari contains numerous statements that are immaterial, that distort the record, or that were addressed by the lower courts with reasoned explanations about why Moore's assertions would not affect the outcome of the case. None of the findings of fact in the courts' opinions are controverted by specific evidence in the summary judgment record.[1]

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[1] Mr. Moore erroneously argues that both the Fifth Circuit and the District Court deviated from the evidence by finding that Lilly's pharmaceutical representatives may be discharged for sample accountability discrepancies. Mr. Moore argues that the only consequence is placement of the "daily log." (Petition, page 17). This argument is without evidentiary support and confuses simple discrepancies with discrepancies accompanied by a suspicion of falsification. As the District Court found, Lilly

Several pages of Moore's Petition contain a near verbatim rendition from his briefs below proclaiming his innocence on the charge of records falsification. Moore's assertions, however, are based on selective and incomplete references to uncontroverted facts in the summary judgment record and, even then, his protests do not contradict the unassailable fact that Lilly had objective reasons to suspect him of falsifying sample accountability records. Simply put, the facts are uncontroverted that (1) Moore filed a false report attesting that he had distributed samples which, as it turned out, he never had in his possession, (2) once informed of the discrepancy, he sent a letter requesting that his records be altered to reflect "what really happened," and (3) when it was later discovered that the distribution set forth in his letter was impossible, he tried to retrieve the falsified report. Lilly, of course, refused and discharged Moore for falsifying company records.

The summary judgment record, as posited by both lower courts, leaves no room for debate on the fact that pharmaceutical representatives are responsible for keeping track of the drug samples they receive and distribute to physicians. Lilly's salespersons are also responsible for accounting for their samples at the end of each quarter. Because of his tracking and accounting responsibilities, it is uncontroverted that Moore was required to be attentive to the packing slips and to the contents of the boxes he

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during the two (2) years prior to Moore's termination had discharged five (5) pharmaceutical representatives under the age of 40 for records falsification.

received from the Shipping Department. Moore, therefore, was necessarily aware he never received the samples that he later claimed in his letter he had distributed.

Uncontroverted evidence confirms that it was *Moore's* dereliction in failing to keep accurate records of where, when, and to whom he was distributing pharmaceutical samples that led to his filing and attempted retreival of a false explanation for the sampling discrepancies. The suspicion was heightened further by his false representations that his second quarter discrepancy was the consequence of mistakenly marking his call cards[2] "Axid 150" instead of "Axid 300",[3] even though he made no effort to verify the truth of these representations.[4] Moore's asserted "facts" miss the point in an ADEA case and merely serve to reinforce Lilly's substantial grounds for believing that he was trying to cover up the false report concerning pharmaceutical distribution.

Respondent presents this concise recount of the facts, choosing not to burden the Court further by repeating all the material, uncontroverted facts contained in the summary judgment record. The pertinent facts as recounted above as well as those in the lower courts' decisions are

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[2] A call card, sent to Lilly each day by its salespersons, reports the day's distributions of drug samples. If the daily reports differ from quarterly inventories of the salesperson's samples, the discrepancy – if unreconciled – can result in the salesperson's termination.

[3] Axid is a drug that slows the stomach's production of acid and is commonly prescribed for patients suffering from chronic indigestion and ulcers.

[4] Again, such a "mistake" was impossible.

clearly sufficient. In short, the record does support the lower courts' decisions. However, if it will assist the Court, Respondent promptly will provide a printed supplement containing the complete list of facts along with supporting affidavits, deposition excerpts, and other exhibits.

REASONS FOR DENYING THE WRIT

This case should not be heard. No "special and important reasons" exist for exercising the Court's discretion to review the Fifth Circuit's lucid decision. Sup. Ct. R. 10-1, 28 U.S.C.A. (West Supp. 1993). The courts below fully considered the evidence in the summary judgment record and correctly decided that a jury could not reasonably have found that Lilly contrived its reason for firing Mr. Moore. Mr. Moore's Petition is merely a desperate appeal from an outcome he did not like. The decision below raises no conflict among the courts of appeals, and the Petition does not raise important issues of federal law or public policy warranting this Court's plenary attention.

I. THIS CASE DOES NOT RAISE A RIPE ISSUE CONCERNING INTERPRETATION OF THE COURT'S RECENT DECISION IN *ST. MARY'S HONOR CENTER V. HICKS*, AND CIRCUITS HAVE YET TO APPLY IT.

Moore's first reason for petitioning the Court is to "clarify the application" of *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

(Petition, page 3). The Fifth Circuit's decision affirming summary judgment against Mr. Moore, however, was issued on April 30, 1993, almost two months *before* the Supreme Court's decision in *Hicks*. *Moore v. Eli Lilly & Company*, 990 F.2d 812 (5th Cir. 1993). The denial of Moore's Petition for Rehearing occurred on May 25, 1993, thus pre-dating *Hicks* by a full month. Plainly, *Moore* may never be cited as authority for a particular interpretation of the Supreme Court's later holding in *Hicks*.

This Court should decline Petitioner's artful invitation to refine its already clear holding in *Hicks*. Should the Court determine that further guidance is someday needed, a far better vehicle would be a case where the appellate court's opinion had actually construed the *Hicks* decision.

Importantly though, no court of appeals has yet issued a published opinion applying Hicks. Consequently, a "principal purpose" for exercising the Supreme Court's certiorari jurisdiction – "to resolve conflicts among the Circuit Courts of Appeals" – does not exist. *See Braxton v. United States*, ___ U.S. ___, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991).

II. THE HOLDING OF *HICKS* NEEDS NO CLARIFICATION.

In any event, the holding in *Hicks* is abundantly clear that Title VII plaintiffs are not entitled to judgment as a matter of law if they prove that the defendant's articulated reason for an employment practice is untrue. 113 S.Ct. at 2749. Any confusion on that point was eliminated

by this Court in *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). *Hicks* re-emphasized the point, and there is no need for further clarification. Indeed, far from eliminating confusion, a grant of certiorari in this case would actually engender uncertainty that presently does not exist.

Moore's argument about the Court's intent focuses on a passage that is dictum to the actual decision in *Hicks*, and the inference Petitioner manufactures and draws from the passage distorts the Court's actual holding. That passage reads as follows:

> The fact finder's disbelief of the reasons put forward by the Defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.

Id.

This passage is dictum because it does not bear directly on the precise issue then before the Court: whether plaintiffs automatically win by proving the falsity of an employer's asserted reasons for its actions. Regardless of its status as dictum or precedent, the passage does not support Moore's strained conclusion that a genuine issue for trial under the ADEA exists whenever the plaintiff establishes a prima facie case and then counters the employer's stated reason for discharge with non-credible assertions. The quoted passage merely says that, in limited cases, and particularly, where there has been a showing of deceptions, not simply incorrectness, plaintiff's evidence of pretext may combine with his prima

facie elements to permit the factfinder to infer intentional discrimination. While this may be enough to support a pro-plaintiff judgment, there must necessarily be a finding of discrimination. Even before reaching *that* point, however, it is critical that the trial court first determine whether an issue of fact remains open. Two federal courts below have agreed that, on the evidence presented, none did.

It is axiomatic that even plaintiffs who manage to discredit their employers' explanations – a threshold burden that Moore has utterly failed to satisfy – retain the ultimate burden of proving that the adverse action was prompted by impermissible motives. E.g., *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981). See also, Fed. R. Evid. 301. Moore's attempt to manufacture confusion regarding the scope of the Court's holding in *Hicks* by cleaving to the passage quoted above was blunted effectively by the *Hicks* majority:

> [T]here is nothing whatever inconsistent between this statement [that rejection of defendants' reasons permits the inference of discrimination] with our later statements that (1) the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason," *infra*, at 2752, and (2) "it is not enough . . . to *dis*believe the employer," infra, at 2754. Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*

113 S.Ct. at 2749 n.4 (emphases in original).

As of June 25 of this year, Moore's contentions lacked the majority support of this Court. Aside from a change of one member of the Court, nothing else has changed over the past four months. Certainly, stare decisis cautions against an abrupt change in course when the precedent at issue has yet to produce any published opinions construing the decision, much less evincing confusion.

III. THE LOWER COURT'S DECISIONS ARE CONSISTENT WITH THE HOLDING AND DICTA OF *HICKS*.

On appeal to the Fifth Circuit, Moore argued that the District Court applied an erroneous and unprecedented "pretext plus" standard in evaluating the evidence. The Fifth Circuit flatly rejected that argument. 990 F.2d at 817. Moore lost in the lower courts because he failed to produce valid evidence to support a finding that Lilly's stated reason for discharging him was "unworthy of credence" (A-13, 14) or that a sufficient nexus existed between his termination and his age.

Moore now is attributing to the Fifth Circuit the same "pretext plus" holding that he said the District Court made. (Petition, page 33). Again, he is mistaken. All the Fifth Circuit held was that "Moore, like so many other ADEA claimants before him, has failed to produce summary judgment evidence capable of showing the existence of a genuine issue of material fact on the pretext issue." 990 F.2d at 819.

Petitioner's response to the considerable, uncontroverted evidence supporting Lilly's conclusion that Moore had given false information and then tried to

cover it up was in fact no response at all: Moore produced absolutely no evidence that Lilly knowingly made up a reason for his termination. The Fifth Circuit noted as much:

> Moore's problem is his total failure to produce any evidence of pretext, either in connection with establishing his prima facie case or subsequently in response to Lilly's demonstration of a non-discriminatory reason for its action. He protests that the district court imposed on him a new "pretext burden"[.] Not so. The district court was merely requiring Moore to do what all of the relevant case law demands that he do: produce some evidence of pretext. [footnote omitted].

Id. at 817.

The 14 pages he spends arguing that he is innocent of records falsification, (Petition, pages 8-21) utterly fail to address the salient issue, whether Lilly acted on the basis of age and made up a reason for a discharge it knew to be untrue. This point was emphasized by the Fifth Circuit:

> The fact that the employer's reasonable belief eventually proves to have been incorrect – if, for example, Moore were eventually to be vindicated from the charges of falsifying records – would not change the conclusion that the firing had been non-discriminatory. To survive summary judgment, therefore, Moore had the burden of producing some evidence that Lilly's proffered explanation is mere pretext.

990 F.2d at 816.

Moore's unspoken premise is that pretextuality is synonymous with unreasonableness. As pointed out by

the District Court and by the Fifth Circuit, however, Moore's theory would radically transform the ADEA into a general wrongful discharge law benefiting people 40 years of age and older and 990 F.2d at 816, 819. That is so because an inference of illegality would be permitted from nothing more than a finding that the employer's stated reason for discharge is unreasonable. In other-words, in ADEA discharge cases there would have to be trial any time the plaintiff (1) submitted an affidavit denying that he committed the offense for which he was discharged or (2) presented evidence that the employer did not exercise reasonable business judgment. To make any sense at all, the pretextuality phase of the burden-allocation scheme must require evidence that the articulated reason is contrived to mask discrimination, not merely mistaken. This is wholly consistent with the holding in *Hicks* and is fully recognized by the Fifth Circuit's opinion.

IV. THE COMMENTS ATTRIBUTED BY PETITIONER TO MR. YELVERTON DO NOT RAISE A GENUINE ISSUE OF MATERIAL FACT.

Petitioner improperly advocates his bizarre notion that a sinister and unlawful intent can be inferred as a matter of law whenever workplace conversations involve general inquiries about retirement plans or everyday musings about life after work. (Petition, pages 36-41). As he would have it, an incoming manager would not be allowed to make the practical inquiry of whether an employee with 30 years experience and who is about to qualify for the company's maximum retirement benefit is going to do what many other people in that position

choose to do – retire. As Petitioner would have it, supervisors would never be permitted to ask employees about their dreams, expectations, and plans upon earning the opportunity to retire with a good pension. Supervisors who engage in such common sense and everyday discussions should, in Moore's view, be brought before a jury and, along with their employer, exposed to liability for damages.

The District Court and a panel of the Fifth Circuit were presented with Petitioner's evidence of "age related remarks" and were uniformly unimpressed, Judge Weiner put it this way in the Fifth Circuit's decision:

> These questions, however, cannot be said to represent, as Moore asserts, a discriminatory intent by Yelverton. Without more, they merely demonstrate a new supervisor's reasonable inquiries about the ages of the members of his work force and their known plans for the future – facts on which to gauge the anticipated longevity of his crew. [footnote omitted]

990 F.2d at 818.

Contrary to Petitioner's characterization, the lower courts did not choose between a lawful and unlawful meaning of comments that reasonably could be viewed as biased. Instead, the courts below simply found that the stray innocuous comments described by Moore, with nothing more, could not possibly evince discriminatory intent. A different ruling by the Fifth Circuit would have spelled gerontological censorship for employers in Mississippi, Louisiana, and Texas.

In short, summary judgment for Lilly was sustained because Moore's response to the Motion was flawed in at least two respects. First, he presented no evidence refuting Lilly's proffered explanation that it believed he had falsified sample accountability records. Second, even if the accuracy of Lilly's age-neutral reason was questionable, Moore produced nothing to suggest that the reason given for his discharge was made up to camouflage discrimination.

Once Lilly met its burden of production, the presumption of discrimination raised by Moore's assumed prima facie case *disappeared*, requiring Moore then to prove that Lilly's actions were motivated by unlawful discrimination. The mandatory presumption accompanying a prima facie case cannot be resurrected at a later day. *Hicks*, 133 S.Ct. at 2749. All Moore could muster in opposition to Lilly's Motion for Summary Judgment was an argument that Lilly was mistaken in its belief that Moore was falsifying records and Yelverton's innocent, stray remarks, which no reasonable factfinder could view as evincing discriminatory intent. As this Court has noted, an issue is not genuine when there is nothing more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). In sum, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Id.* at 587, 106 S.Ct at 1356. Although in the context of a summary judgment proceeding, Moore need only *raise* a genuine issue of fact regarding pretext (rather than prove it), his speculations and subjective beliefs that his discharge was based on age

is, standing alone, simply insufficient to establish a valid ADEA claim. Bald assertions do not suffice.

CONCLUSION

As the Fifth Circuit bluntly (yet accurately) noted, Petitioner's misapprehensions of the burden shifting process "demonstrates Moore's failure to grasp fundamental principles of this area of law." 990 F.2d at 816. The same may be said of his Petition before this Court. Simply put, Moore's case has always suffered a fatal flaw: the absence of a genuine issue of fact that Lilly's asserted reason for Moore's discharge was a pretext for age discrimination. Were a jury to hear Moore's "evidence" of pretext, the possibility of their drawing a contrary inference is, viewed generously, remote. While there is no bright line demarcating when a "genuine issue of fact" degenerates into merely an "attenuated possibility" that a jury might infer a discriminatory motive, as the late Judge John Brown wrote of another ADEA appeal, "the facts of this case are outside even the fuzzy shadows." *Amburgey v. Corhart Refractories Corp., Inc.*, 936 F.2d 805, 814 (5th Cir. 1991).

The Petition for Writ of Certiorari should be dismissed.

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